**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**WASHINGTON, D.C.**

In the Matter of:

UNITED PARCEL SERVICE, Inc.

and **Case No. 06-CA-143062**

ROBERT C. ATKINSON, JR.

**REPLY BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS (RESPONDING TO CHARGING PARTY'S ANSWERING BRIEF)**

## I. INTRODUCTION[1]

Respondent United Parcel Service, Inc. ("UPS" or "Company") files this Reply Brief in Support of its Exceptions to the Decision and Order ("Decision") of the Administrative Law Judge ("ALJ") issued in the above-captioned case on November 25, 2016. *See* JD–112–16. This Reply Brief responds to the Answering Brief of the Charging Party Robert Atkinson ("Atkinson"). Because Atkinson has failed to effectively rebut the compelling arguments set forth by UPS, the Company's Exceptions should be granted.

## II. DEFERRAL TO THE GRIEVANCE PANEL IS PERMITTED AND APPROPRIATE

### *A. The January 2015 Panel was presented with and considered the statutory issue.*

UPS presented myriad evidence and comprehensive arguments showing that the Panel's decision on Atkinson's October 28th discharge satisfies the standard articulated in *Babcock & Wilcox*, 361 NLRB No. 132 (2014). (R. Brief, pp. 21-22, 35-39.) Atkinson insists that the Board should not defer "to a one-sentence decision" by the Panel because the decision itself does not expressly reference the statutory issue. (CP Answer, pp. 1, 3-4.) This argument misconstrues the elements set forth in *Babcock*. Under *Babcock,* the party seeking deferral must show that the fact-finder was presented with and considered the statutory issue. *Id.* at *3. The Board explicitly rejected a more heightened standard, stating:

[1] Joint Exhibits, General Counsel Exhibits, Charging Party Exhibits, and Respondent Exhibits are parenthetically referenced as "JX-___," "GC-___," "CP-___," and "RX-___," respectively. Transcript pages are parenthetically referenced as "Tr. ___." Pages from the Decision are cited parenthetically as "ALJ, p. ___." Pages from the Charging Party's Answering Brief are cited parenthetically as "CP Answer, p. ___," and pages from Respondent's Brief in Support of Exceptions are cited parenthetically as "R. Brief, p. ___."

> [T]he General Counsel's proposal that deferral is warranted only if the arbitrator "correctly enunciated the applicable statutory principles and applied them in deciding the issue" would set an unrealistically high standard for deferral. Our modified standard, by contrast, will require that the proponent of deferral demonstrate that the parties presented the statutory issue to the arbitrator, and the arbitrator considered the statutory issue or was prevented from doing so by the party opposing deferral[.]

*Id.* (emphasis added).

In *Babcock*, the award at issue reflected absolutely no evidence the statutory issue was considered. *Id.* at *8. By way of contrast, the Panel decision in this case—although brief and nondescript—nonetheless demonstrates that the statutory issue was both presented and considered. (R. Brief, pp. 37-38.) The Master Agreement and WPA Supplement expressly authorized the Panel to decide Atkinson's NLRA allegations. (ALJ, p. 49; JX-1, pp. 12-14, 20-28, 66, 127-28; JX-2, pp. 188-90, 205-06.) Atkinson's grievances' and Case Files expressly referenced his unfair labor practice claims and cited specific statutory provisions, and the Panel asked detailed questions about the nature of Atkinson's NLRA-protected activity. (Tr. 287-96, 337-38, 353, 954, 981-82, 992, 995-96, 1002-04; RX-17; RX-20.)

Because Atkinson's grievances and Case Files expressly cited and discussed the NLRA, as well as Master Agreement Articles 21 and 37 (expressly prohibiting discrimination for union activity or other protected concerted activity), the Panel was obviously presented with the statutory issues. (Tr. 290-91, 954; RX-9, pp. 7-8; RX-21.) And given the Panel's specific inquiries into the nature of Atkinson's concerted activity, as well as the Panel decision's reference to multiple contract provisions, the Panel clearly considered Atkinson's NLRA allegations in denying the grievances and finding "no violations of any contract articles."[2] (ALJ, p. 42; Tr. 293, 954, 995-96, 978, 982, 1002-04; RX-21 (emphasis added).) Accordingly, deferral is appropriate.[3]

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[2] If the Panel had decided only the contractual "just cause" issue governed by Master Agreement Article 52, it would have no reason to refer to "contract articles" in the plural context. (RX-21 (emphasis added).) It is clear this plural reference describes Master Agreement Articles 21 and 37, which are the primary contract provisions cited in Atkinson's two grievances and discussed in his Case File. (RX-20, pp. 6-7.) Indeed, it appears from the grievances that Atkinson added the reference to Article 52 only as an afterthought. (RX-20, pp. 6-7.)

[3] The Charging Party is correct that Respondent inadvertently misstates the deferral standard in *Babcock* by stating that deferral is mandatory unless the party opposing deferral fails to show that the award is 'clearly repugnant to the Act,' i.e., 'palpably wrong' or 'not susceptible to an interpretation consistent with the NLRA. (CP Answer, p. 5.) Admittedly, this is the standard from *Olin* that the *Babcock* court declined to apply. Nevertheless, *Babcock* also confirmed that "deferral normally will be appropriate if the party urging deferral shows that Board law reasonably permits the arbitral award." 361 NLRB No. 132, *11 (Dec. 15, 2014). The Board was clear that it would not conduct a *de novo* review of the decision, and that the standard for deferral "should not be a difficult standard to meet." *Id.* (emphasis added). For example, "an arbitrator typically should understand that retaliation for the exercise of employees' Section 7 rights can never constitute 'just cause[.]'" *Id.* Here, the Panel's decision is obviously a reasonable application of the NLRA. It is entirely permissible to fire an employee because of repeated performance issues, regardless of his union activities. Moreover, there is no evidence or indication whatsoever that the Panel believed Atkinson's Section 7 rights were "just cause" for termination. The Panel asked detailed questions about the nature of Atkinson's NLRA-protected activity (Tr. 287-89, 292-93, 295-96, 353, 337-38, 954, 995, 1002-04), and Atkinson's

### B. *The Panel was "fair and regular," with no apparent or actual conflict of interest.*

Atkinson argues that the panel proceedings were not "fair and regular" because Atkinson was "represented by a political opponent" and the Panel was composed of "negotiators whose contract he helped to defeat," including a supervisor who monitored the Vote No campaign. (CP Answer, pp. 3-4.) However, the undisputed evidence reflects otherwise.

The Panel was comprised equally of Union and Company representatives from another geographic area with no knowledge of the dispute.[4] (ALJ, pp. 4-5, 42; Tr. 151, 293-94, 943, 975-76, 1002; RX-17; RX-21.) Atkinson's hearing lasted longer than most due to extensive questioning of many witnesses (i.e., Atkinson, Fischer, Kerr, Alakson, DeCecco, and McCready), detailed discussions of the NLRA allegations, and lengthy Panel deliberations. (Tr. 978, 981-82, 1002-04.) Fischer herself testified before the Panel on Atkinson's behalf, thus demonstrating that no conflict of interest existed between Atkinson and Local 538 or the IBT.[5] (Tr. 981.) At the close of the hearing, Atkinson specifically acknowledged having a full and fair opportunity to present both October 28th discharge grievances and receiving proper representation from Fischer.[6] (Tr. 980-82.) After an unusually long deliberation, the Panel denied Atkinson's grievances, finding that his October 28th discharge resulted in "no violations of any contract articles." (ALJ, p. 42; Tr. 978, 982, 1004; RX-21.) At that point, Atkinson's October 28th discharge became final. (Tr. 1005-06.)

Atkinson touts his political rivalry with Fischer as a reason to deny deferral. (CP Answer, pp. 3.) But Atkinson's run for office against Fischer does not establish that she was unwilling or unable to represent

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grievances and Case Files expressly cited and discussed the NLRA, as well as Master Agreement Articles 21 and 37 (prohibiting discrimination for union activity or protected concerted activity), the Panel was obviously presented with the statutory issues. (Tr. 290-91, 954; RX-9, pp. 7-8; RX-21.)

[4] It is true that both union business agents who presided over Atkinson's Panel also sat on the WPA negotiations committee. However, all WPA Teamsters local business agents sit on the WPA negotiations committee, so there were no business agents who did not participate in negotiations who could have presided over the Panel instead. (Tr. 976-77.) Again, if Atkinson wanted to avoid any actual or perceived conflict of interest by members of the Panel, he could have simply bypassed the Panel hearing and proceeded straight to arbitration. (JX-2, p. 190.) Atkinson chose not to exercise this contractual right.

[5] The mere fact that Atkinson ran for union office against Fischer does not establish that she was unwilling or unable to represent Atkinson fairly and competently. *See Asset Protection & Security Services*, 362 NLRB No. 72 (Apr. 22, 2015) (that discriminatee's union representative had been on opposite ticket during campaign is insufficient to warrant a finding of hostility, conflict of interest, or adverse interest). Absent concrete evidence that Fischer failed to faithfully perform her representational duties—which has not been presented—the fact that Atkinson and Fischer were political opponents is not enough to demonstrate a conflict of interest.

[6] Atkinson ultimately filed unfair labor practice charges against Local 538, styled as Case Nos. 06-CB-143060 and 06-CB-146170. In relevant part, these charges alleged that Fischer "failed to investigate or meaningfully support the . . . grievance of [Atkinson's] October [28], 2014, termination during the entire grievance process, including at the January 14, 2015, [Panel] meeting at which the termination was upheld;" "withdrew or failed to process . . . other grievances filed by or on behalf of [Atkinson];" and "encouraged rather than opposed [the Company's] disciplines of him." *See* ULP Charge Case No. 06-CB-143060 (filed Dec. 18, 2014) *and* ULP Charge Case No. 06-CB-146170 (filed Feb. 10, 2015). However, the Board dismissed (and did not reinstate on appeal) Atkinson's two unfair labor practice charges against Local 538. (RX-26, p. 1; RX-54, p. 2.)

Atkinson fairly and competently. *See Asset Protection & Security Services*, 362 NLRB No. 72 (Apr. 22, 2015) (that discriminatee's union representative had been on opposite ticket during campaign is insufficient to warrant a finding of hostility, conflict of interest, or adverse interest). Absent concrete evidence Fischer failed to faithfully perform her representational duties—which has not been presented—the fact that Atkinson and Fischer were political opponents is not enough to demonstrate a conflict of interest.

Nor does the Company's monitoring of the "Vote No" campaign support Atkinson's theory that the Panel proceedings were not "fair and regular." (CP Answer, p. 3.) The record reflects no evidence of conduct so egregious as to prevent a fair Panel hearing. This case stands in stark contrast to *Mercy Hospital & Serv. Employees Int'l Union*, 18-CA-155443, 2016 WL 2621337 (May 6, 2016), where the judge found the grievance procedure appropriate despite evidence that the employer had engaged in actually egregious conduct, including preventing the grievant from asking questions at team meetings and threatening to discipline grievant for concerted activity.

### C. *The Board's deferral to the November 2014 Panel supports deferral to the January 2015 Panel, and contradicts a finding of animus.*

The Board's deferral to the November 2014 Panel decision that Atkinson's June 19th discharge (and prior discipline) was nondiscriminatory necessarily means the June 18th blended ride is likewise lawful. (R. Brief, pp. 30-31.) Because the lawfulness of the June 19th discharge depends on the lawfulness of the June 18th ride, a finding that one was lawful necessarily requires a finding that the other was as well. In his Decision, the ALJ failed to accept this fundamental premise, so his findings and conclusions are inherently irreconcilable with those of the Panel to which the Board already deferred. (ALJ, pp. 53-54.)

Atkinson argues that deferral is "an act of discretion by the Board," and that pre-settlement conduct may be considered "as background evidence to establish a motive or object of the respondent in its pre-settlement activities." (CP Answer, pp. 6-7 (citing *Diamond Elec. Mfg. Corp.*, 346 NLRB 857, 858–59 (2006).) But a situation involving the initial consideration of facts and evidence that has never before been heard or adjudicated due to a settlement is far different than a situation involving the re-consideration of facts and evidence that have already been heard, adjudicated, and deferred to by the Board. Here, by deferring to the November 2014 Panel, the Board has already accepted the finding that Atkinson's June 19th discharge

(and underlying June 18th blended ride) was lawful. While the Board may make findings on issues not addressed by the November 2014 Panel, the lawfulness of the June 19th discharge (and underlying June 18th blended ride) must be recognized.

### *D. Atkinson's allegations are not so interrelated as to mandate all-or-nothing deferral for both the June and October discharges.*

Atkinson argues that "[i]f two claims are factually related and one is deferrable and the other is not, then the Board proceeds on both charges," citing *Hoffman Air & Filtration Sys., Div. of Clarkson Indus., Inc.*, 312 NLRB 349, 352 (1993) and *Arvinmeritor, Inc.*, 340 NLRB 1035, 1035 fn.1 (2003) in support of his position. (CP Answer, p. 3 (citing CP Brief, pp. 9-10.) But Atkinson's cursory discussion of *Hoffman Air* and *Arvinmeritor* grossly distorts the nature and scope of the Board's holdings. When those cases are properly analyzed, it is clear they do not preclude deferral of Atkinson's discharge allegations.

The complaint allegations in *Hoffman Air* arose from a single disciplinary meeting on a single date, where the employer allegedly violated 8(a)(3) by issuing the steward a warning and allegedly violated 8(a)(1) by saying the steward would be an "example" to other employees. *Id.* at 349-51. The Board emphasized that, while an arbitrator could award full relief for the 8(a)(3) allegation, an arbitrator could not enter a "cease-and-desist" order to address the 8(a)(1) allegation. *Id.* at 351-52. The Board was therefore forced to retain jurisdiction of the 8(a)(1) allegation, and because the evidence necessary to prove both allegations would be identical, the Board found it would be nonsensical to defer only the 8(a)(3) allegation, thereby creating two factually-parallel proceedings in different forums with potentially inconsistent results. *Id.* at 352; *see also Everlock Fastening Sys., Inc.*, 308 NLRB 1018, 1020 fn.8 (1992) (declining to defer only one complaint allegation involving exact same legal and factual questions as two other allegations for which employer did not seek deferral, particularly where employer did not express unequivocal willingness to arbitrate sole allegation for which deferral was requested).

Similarly, in *Arvinmeritor*, the 8(a)(1) and 8(a)(5) allegations arose within five days of one another and were inextricably intertwined. 340 NLRB 1035, 1037. The employer allegedly violated 8(a)(5) on April 11, 2002, by repudiating a labor agreement, and the employer allegedly violated 8(a)(1) on April 16, 2002, by threatening employees with reprisal if they attempted to enforce the repudiated contract. *Id.* The employer

only sought deferral of the 8(a)(5) allegation—not the 8(a)(1) allegation. *Id.* at 1035-36 and fn.1. The Board was therefore required to hear the 8(a)(1) allegation itself, and the Board recognized that the 8(a)(5) decision would be outcome-determinative for the 8(a)(1) claim. *Id.* at 1035 and fn.1. The Board saw no point in deferring the 8(a)(5) allegation when it would be factually-parallel to—and dispositive of—the 8(a)(1) claim that the Board was legally required to decide.

Compared to the contemporaneous violations in *Hoffman Air* and the outcome-determinative claims alleged in *Arvinmeritor*, Atkinson's June 20th discharge and October 28th discharge occurred over four months apart and do not involve virtually identical facts. The Master Agreement's grievance procedure provides the ability to award a full remedy in connection with each discharge, so unlike in *Hoffman Air*, the Board need not feel compelled to hear either claim to ensure the availability of complete relief. Finally, in contrast to *Arvinmeritor*, a decision on one of Atkinson's discharges would not necessarily be dispositive of the other, so different outcomes in each case would not create inherent inconsistencies. In short, the Board law cited by Atkinson is easily distinguishable and should not preclude deferral in this case.

## III. ATKINSON'S VOTE NO ACTIVITIES WERE NOT ENTIRELY PROTECTED

Atkinson argues that his "Vote No" activities were "dissident concerted activities" and thus "generally protected." (CP Answer, pp. 8-13.) He cites *Town & Country Supermarkets*, 340 NLRB 1401 (2004), and *United Parcel Service*, 230 NLRB 1147 (1977), as examples of dissident activity, arguing his own conduct is of the same ilk. These cases are easily distinguishable. In *Town and Country*, the employee handed out flyers and made speeches opposing the contract prior to its ratification. 340 NLRB at 1429-30. In *United Parcel Service*, the employee published a newspaper expressing dissatisfaction with the union's bargaining strategy in anticipation of a new contract. 230 NLRB at 1151. Neither of these cases involve dissident activity after a contract is ratified by a majority of the union's members. Instead, these preemptive actions were designed to "influence the efforts of the employees' bargaining representatives." *Id.* at 1150. Atkinson's activities, in contrast, go too far.

The "Vote No" Campaign lost NLRA protection the moment a majority of IBT members ratified the Master Agreement in April 2013. (R. Brief, pp. 24-26.) *See NLRB v. Allis-Chalmers Mfg. Corp.*, 388 U.S.

175, 180 (1967); *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975) (no NLRA protection for union dissidents who demanded to bargain over minority terms and announced picket and boycott to enforce minority demands). The IBT—as the duly-elected representative—negotiated the Master Agreement, including the transfer of 140,000 employees to TeamCare, the same healthcare plan already covering much of the Unit. (Tr. 668, 671.) This controversial change was the overriding reason and but-for cause of the "Vote No" Campaign, which launched an indirect attack on the Master Agreement by strategically rejecting its supplements.[7] (Tr. 319-21, 678-79, 684.) By demanding to bargain over minority terms in an attempt to paralyze the Master Agreement ratified by a majority of the Unit, Atkinson's actions derogated the IBT and lost NLRA protection.[8] (RX-58; CP-6.)

Atkinson claims that only wildcat strikes and slowdowns fall within the bounds of unprotected activity. (CP Answer, pp. 10-12.) While this activity is undoubtedly unlawful, it is not the only type of dissident conduct that is unprotected. What makes dissident activity unlawful is whether it has the purpose or effect of disrupting the bargaining process or supplanting the exclusive bargaining representative. *Coca Cola Puerto Rico* Bottlers, 362 NLRB No. 125, slip op. 1-2 (2015). While courts may have "generally excluded . . . unauthorized strikes and strikes in breach of a collective bargaining agreement," *Food Fair Stores v. NLRB*, 491 F.2d 388, 393 (3d Cir. 1974), the operative word is "generally"—indicating that conduct other than a strike can also lose NLRA protection.

Atkinson did more than simply "voice disagreements with [his] union's bargaining strategy." (CP Answer, p. 11.) Upon examining the relevant factors, including "(1) whether the employees are attempting to bargain directly with the employer and (2) whether the employee's position is inconsistent with the union's position," *Id.*, it is clear that the post-ratification "Vote No" campaign was intended to obstruct the bargaining process. By engaging in the "Vote No" campaign after ratification of the Master Agreement, Atkinson (and

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[7] UPS corporate labor managers testified that "[t]here was no hiding it with respect to any of those three [unratified supplements] . . . . all kinds of stuff about how we are not voting this contract in ever, ever, ever if this healthcare provision stays there . . . ." (Tr. 684.)

[8] As stated in Respondent's Brief, Atkinson also engaged in other dissident activities that lacked NLRA protection. (R. Brief, pp. 24-26.) For example, he directly violated Articles 4, 8, and 37 of the Master Agreement and Article 49 of the WPA Supplement by proudly publicizing his over-allowed hours and encouraging unauthorized slowdowns. (Tr. 259, 262, 265-66, 1564-65; RX-55, pp. R01782, R01783.) Atkinson's willful misconduct was expressly punishable under the Master Agreement, which emphasizes that union stewards who induce unauthorized slowdowns may "be singled out for more serious discipline, up to and including discharge." (JX-1, pp. 12-13, 22, 128; JX-2, pp. 186-88.)

others) attempted to go over the heads of his bargaining representatives and override the wishes of a majority of IBT members.

## IV. ATKINSON WAS NOT DISCHARGED BASED ON NLRA-PROTECTED ACTIVITY

UPS has already addressed this issue in its Exceptions Brief and Answering Briefs, so the Company will only revisit one discrete issue here. Atkinson attempts to rehabilitate the ALJ's unsupported findings regarding Preload Supervisor Matt Blystone ("Blystone"), Dispatch Supervisor Ray Alakson ("Alakson"), and Center Manager John Lojas ("Lojas"). (CP Answer, pp. 14-17.) However, an ALJ's credibility determinations are entitled to deference only when they are based on "demeanor or conduct at the hearing." *Kelco Roofing*, 268 NLRB 456, 456 (1983). The ALJ is in no better position than the Board to assess inherent probabilities of substantive testimony, and the Board is not bound by credibility determinations based on such assessments. *Betances Health Unit, Inc.*, 283 NLRB 369, 370 (1987) (reversing credibility determinations based "on [the ALJ's] assessment of the inherent improbability that [a particular] statement . . . was made"); *S&G Concrete Co.*, 274 NLRB 895, 897 (1985) (rejecting credibility determinations because "the Board is just as capable as the hearing officer of evaluating the inherent probabilities of the testimony"). The ALJ's Decision in this case is plagued by subjective evaluation of inherent probabilities. That is, the ALJ's credibility determinations are based on his assessment of the relative likelihood of the substantive testimony rather than on the witnesses' demeanor and conduct. (ALJ, pp. 34, 41, 53-54.)

Atkinson alleges Blystone called him in the middle of the night on July 5, 2014, to say he heard Bartlett, DeCecco, and Alakson call Atkinson a "troublemaker" and plot to "get rid of him." (CP Answer, pp. 14-17, 21-22.) Atkinson further claims that, in December 2014, Lojas said he "definitely agree[d]" the windshield signs in January-March 2014 "put [Atkinson] on the radar." (CP Answer, pp. 16-17, 26.) The ALJ's decision to credit this testimony about Blystone and Lojas is not supported by the evidence,[9] so the

[9] As to the testimony about Blystone, Bartlett, DeCecco, and Alakson denied making such comments and/or being influenced by Atkinson's "Vote No" activities, union stewardship, and union candidacy. (R. Brief, p. 30, n.43; Tr. 1206-07, 1381-83, 1389, 1392-93, 1551-53, 1656-57.) Moreover, Atkinson said nothing about Blystone's alleged remarks in his first Board affidavit on July 7, 2014, two days after Blystone's alleged phone call. (Tr. 656-57.) In his second Board affidavit on January 11, 2015, Atkinson merely alleged Blystone said he heard Bartlett, DeCecco, and Alakson "discuss the need to end [his] employment on several occasions." (Tr. 343-44, 356-57.) Moreover, the ALJ has found that Bartlett is a credible witness. (ALJ, p. 22, n.32.) The same is true regarding the ALJ's findings as to Atkinson's other allegations regarding supervisors Alakson and Lojas and their alleged threats and comments about "Vote No" activity. (CP Answer, pp. 15-16.) Contrary to Atkinson's assertions, Respondent's Brief provides myriad reasons why Atkinson should not be credited on these points. (R. Brief, pp. 27-30, 39-41.) Simply put, these findings are not supported by the record evidence and should be overruled.

Board should "have no reluctance" to overrule those credibility determinations.[10] *Standard Elec. Co., Inc.*, 162 NLRB 1045, 1054 (1967). That UPS did not call Blystone or Lojas to testify does not, without more, support an inference that he did indeed make the alleged statements. Atkinson cites *Roosevelt Mem'l Med. Ctr.*, 348 NLRB 1016, 1022 (2006) for the proposition that failing to call a witness allows for a negative inference. But in *Roosevelt*, the Board explicitly overruled an ALJ's credibility determination because there, as here, no basis existed for such an inference. *Id.* Rather, just as in this case, other record evidence made the witness's testimony unnecessary. *Id.*

## V. ATKINSON'S POST-DISCHARGE MISCONDUCT BARS REINSTATEMENT

Atkinson claims the ALJ failed to apply the test for analyzing post-discharge misconduct articulated in *O'Daniel Oldsmobile*, 179 NLRB 398, 406 (1969). (CP Answer, p. 28.) This argument is disingenuous, at best, as the ALJ did in fact apply the *O'Daniel Oldsmobile* standard. While some of the cases cited by the ALJ may concern pre-discharge misconduct that went undiscovered until after the discriminatee's discharge, the legal analysis is the same as in cases involving post-discharge misconduct. *See, e.g., Family Nursing Home*, 295 NLRB 923, 923 fn.2 and 928 (1989) (discriminatee not entitled to reinstatement or backpay due to pre- and post-discharge misconduct). Moreover, the ALJ plainly cited *Bob's Ambulance Service*, 183 NLRB 961, 961 (1970), where the Board reopened the record and remanded the case to the Regional Director to hear evidence about the discriminatee's post-discharge criminal conviction and jail time that the employer argued should cut off backpay and preclude reinstatement. (ALJ, p. 55.) It is thus clear that the ALJ applied the correct legal standard in limiting Atkinson's remedies.

In addition, Board precedent supports a backpay cutoff as of the date that either the employee engaged in the misconduct, *Colorado Forge Corp.*, 260 NLRB 25, 37 (1982), or when the employer first acquired knowledge of the misconduct, *John Cuneo, Inc.*, 298 NLRB 856-857 (1990). Contrary to Atkinson's suggestion, UPS did introduce evidence of when UPS first learned of Atkinson's discriminatory post, as

[10] As to the testimony about Lojas, he did not even work in the Center until August 2014, long after the windshield signs disappeared. (JX-6, p. 2.) Prior to coming to the Center, Lojas in New Stanton, 45 minutes away, so he would have no knowledge of the Center's windshield signs. (Tr. 834, 1667; CP-6, p. 8.) In any event, post-discharge statements reflecting anti-union animus on the part of the employer cannot convert a for-cause termination into unlawful retaliation where the employer would have discharged the employee even absent his union activity. *See, e.g., Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (post-discharge statement reflecting anti-union animus on part of decision-maker did not convert for-cause termination into unlawful retaliation where employer would have discharged employee even absent his union activity).

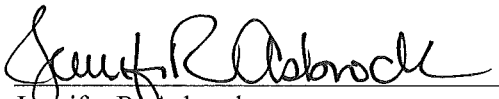
McCready clearly stated that he "indirectly heard from" Atkinson through a social media posting four or five months after the January 2015 Panel. (Tr. 1038-39.) The ALJ erred by finding that McCready did not answer that specific question. Nevertheless, if McCready's testimony needs further development on that limited issue, the fair alternative is to determine the correct cutoff date at a compliance hearing, rather than selecting a date at random. *See, e.g.*, *Berkshire Farm Ctr. & Servs. for Youth*, 333 NLRB 367 (2001) (backpay cutoff date, if any, shall be determined in compliance); *Marshall Durbin Poultry Co.*, 310 NLRB 68, 71 fn.7 (1993) (although evidence of post-discharge misconduct may be introduced at the liability phase to preclude the remedy of reinstatement, "[t]he specific backpay period and the consequent amount owed to . . . are matters that [left] to the compliance stage").

## VI. CONCLUSION

For the reasons stated above, as well as in the Company's own Answers, Exceptions, and Brief in Support, Atkinson's Exceptions should be denied.

Dated: March 10, 2017

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2017, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlrb.org) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

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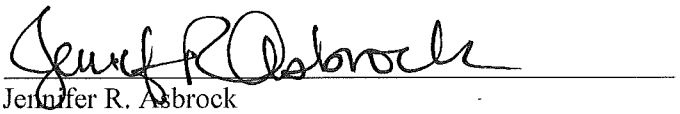

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